THE CREATION OF THE RELATION OF CARRIER AND PASSENGER.

AS in the case of other persons engaged in a public undertaking, so in the case of a carrier of passengers, responsibility begins upon the acceptance by the carrier, in some way or other, of the person who thus becomes a passenger. This may be an express acceptance by the present assent of the carrier or his servant, or it may be an acceptance by the carrier, in advance, of everyone who complies with the terms of a certain offer. The latter is the commoner method of accepting passengers. "A railroad company," as Mr. Justice Knowlton put it,[1] "holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, and at a proper place, to be carried."

Either by securing express acceptance of himself as a passenger, or by complying exactly with the terms of the carrier's offer, the passenger, to be such, must have come into a relation with the carrier based on the carrier's consent to receive him. Without such consent one cannot become a passenger, even though one has a legal right to be received. If, for instance, the carrier should violate his legal duty by refusal to receive a proper person as a passenger, the latter would have an action against the carrier, but the action could not be based upon the duty of a carrier to a passenger. The carrier's wrong consists not in violating the right of a passenger, but merely in violating the right to become a passenger, — a very different right.

This right to become a passenger is not the only right of a non-passenger against a carrier. One who intends to become a passenger at a future time may have an immediate right against the carrier of access to his office or conveyance, in order to make inquiries, to buy tickets, or to wait a reasonable time until the carrier is ready to receive him as a passenger. This right is incidental to the right to become a passenger. We shall see later that the exercise of the right does not necessarily and immediately make the person so exercising it a passenger.

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[1] Webster *v.* Fitchburg R. R., 161 Mass. 298, 37 N. E. Rep. 165.

There are other non-passengers who have rights against the carrier, who do not themselves even intend to become passengers. Such are hackmen who come to the station to bring passengers, and relatives or friends who come to escort passengers to their vehicle or to meet them on arrival. Such rights as these, like the rights of the intending passenger, are incidental to the business of the carrier, and derive their existence from actual or contemplated passenger-rights.

It is not always easy to distinguish between the real passenger-rights and the subordinate incidental rights, or to say in some cases whether a party has become a passenger or is still in the exercise of a preliminary incidental right. But there is one important consequence of the passenger-right having come into existence, that is, the obligation of the passenger to compensate the carrier. This obligation is the consequence, not the cause, of the existence of the relation; but as it is sometimes easy to see that no obligation to pay has arisen, the absence of such obligation determines the nature of the relation. For the carrier is entitled by the law to compensation only for exercising his business as carrier; and all the incidental duties of which I have spoken must be rendered without compensation.

With this short preliminary statement of the principles governing our subject, let us examine certain classes of cases in which the existence of the relation has been brought in question.

Payment of Fare.

It must be evident that the purchase of a ticket does not of itself render the purchaser liable for the payment of fare at any particular time. He may take the next train, or wait for five years; he may use the ticket himself, or give it away; and it may never be used. The mere purchase of a ticket therefore does not make the purchaser a passenger;[1] and stress is laid on the purchase of a ticket, in several cases, merely because it is in the particular case evidence of a *bona fide* intention to become a passenger.

If the ticket is surrendered at a gate or door through which the person must pass to take the carrier's vehicle, this, it is clear, makes the person a passenger; since he then pays his fare, which he is only obliged to pay as a condition of being accepted as a passenger. The payment therefore proves such acceptance.[2]

[1] Vandegrift *v.* West Jersey & S. R. R., 71 N. J. L., 60 Atl. Rep. 184.

[2] Illinois Cent. R. R. *v.* Treat, 179 Ill. 576, 54 N. E. Rep. 290.

On the other hand, the payment of fare is not necessary before a person becomes a passenger, but a passenger who takes a railroad train expecting to pay a fare has already the relation of a passenger to the company, though a conductor has not yet appeared to collect a fare; since such a person is liable to pay a fare upon demand, and is in fact making a tender of the fare at the moment of getting on board the vehicle. A delay of the conductor in collecting the fare is due simply to the convenience of the company, which might, if it chose, collect the fare from the passenger before permitting him to get on board the vehicle. The moment of beginning passage is the same, therefore, whether the fare is collected in advance, or is paid during the progress of the journey.[1]

Waiting at Station for a Train.

It must be obvious that the relation of carrier and passenger may arise before actual transportation has begun. Thus, if a person who intends to be carried is on board a vehicle which is ready to start he has become a passenger, though the vehicle has not yet started.[2] So one who is on a steamboat at a wharf, ready to start, is a passenger, though the boat has not yet started.[3]

One who is in the waiting-room of a station, waiting to take the carrier's car, has been held to be a passenger,[4] but the question involved was merely the right of such person to safe premises, or to proper treatment by the carrier's servants, and this right would exist independently of the relation of carrier and passenger. It is better, therefore, to speak of the obligation which the carrier owes "to one intending to become a passenger in one of its trains, who would have a right to use the waiting-room for a reasonable time before the arrival of the expected train."[5] At any rate, if the intending passenger came to the waiting-room and remained there after the train had gone, he would clearly not be a passenger.[6]

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[1] Mellquist *v.* The Wasco, 53 Fed. Rep. 546; Frink *v.* Shroyer, 18 Ill. 416; Ohio & M. R. R. *v.* Muhling, 30 Ill. 9; Russ *v.* Steamboat War Eagle, 14 Ia. 363 (passenger on board boat at end of first half of a round trip, waiting for the boat to start back, is a passenger, though the return fare is not paid); Hurt *v.* Southern R. R., 40 Miss. 391; Houston & T. C. R. R. *v.* Washington (Tex. Civ. App.), 30 S. W. Rep. 719.

[2] Massiter *v.* Cooper, 4 Esp. 260.

[3] Hrebrik *v.* Carr, 29 Fed. Rep. 298.

[4] Gordon *v.* Grand St. & N. R. R., 40 Barb. (N. Y.) 546; Norfolk & W. R. R. *v.* Galliher, 89 Va. 639, 16 S. E. Rep. 935.

[5] Devens, J., in Heinlein *v.* Boston & P. R. R., 147 Mass. 136, 16 N. E. Rep. 698.

[6] Heinlein *v.* Boston & P. R. R., *supra.*

It is commonly said that one who is on the platform of a railroad company, waiting for a train which he intends to take there as soon as it arrives, is a passenger.[1] Here, again, it may be doubtful whether he is strictly a passenger, or is not, rather, an intending passenger to whom the carrier owes the duty of providing a safe platform. The distinction is not usually an important one. It became so, however, in a peculiar case where a drover about to go in the car with cattle was walking past the engine to get on board his car when he was hit by a piece of wood negligently thrown from the engine. His drover's ticket exempted the carrier from liability. This exemption would become an agreement of the drover and binding upon him as soon as he used the ticket, or, in other words, became a passenger upon the terms of the agreement in the ticket. The court held that the exemption was effectual because he had already become a passenger.[2] It might be argued that on the special facts of the case the drover was already bound by the terms of the ticket, because he had already come under an obligation to the carrier to take passage on the train, in order to take care of the cattle, which were already loaded. The case, however, was decided upon the general principle that a person upon a station platform about to take a train is a passenger. If under such circumstances the person in question, finding that he had forgotten some article which he desired to take along with him, had abandoned his intention to take that train, and had left the station, could it be argued that he was bound to pay a fare to the railroad company on account of the abandoned trip? It would seem not; and if not, upon principles already stated he should not be held strictly a passenger.

An intending passenger who has bought a ticket, or is prepared to pay fare, and is passing over tracks of the company, under direction of its servants, or according to custom, toward the train which he is about to take, has been held to be a passenger.[3] But in the absence of usage or of the directions of the carrier, even a person in a station would not become a passenger by crossing a track toward his train. Crossing railroad tracks is not ordinarily a safe or proper way to present oneself to a railroad as a pas-

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[1] Central R. R. *v.* Perry, 58 Ga. 461; Caswell *v.* Boston & W. R. R., 98 Mass. 194; Carpenter *v.* Boston & A. R. R., 97 N. Y. 494.

[2] Poucher *v.* New York C. R. R., 49 N. Y. 263.

[3] Allender *v.* Chicago, R. I. & P. R. R., 37 Ia. 264; Warren *v.* Fitchburg R. R., 8 Allen (Mass.) 227.

senger; and in the absence of express acceptance where the party relies on the general invitation of the carrier, it cannot be supposed that the carrier invites persons to take its trains in any other than a safe and proper way.[1]

One walking along the public street toward the station with the intention of taking the train is certainly not yet a passenger;[2] nor *a fortiori* is one who is proceeding across the tracks directly from the street to the train. In such a case the intending passenger must at least have been received on the premises of the company before proceeding upon the tracks if he is to be regarded as a passenger. One who, merely in order to reach in the quickest way the platform from which his train starts, crosses the carrier's tracks on his way from the sidewalk to the train, cannot be regarded as a passenger.[3]

Boarding a Moving Train.

If a person gets on a moving train after it has started, he is "outside of any implied invitation" on the part of the carrier, and does not at once acquire the rights of a passenger.[4]

In the Massachusetts case just cited, it is held that even his reaching the platform of the car safely does not give him those rights. "If he had reached a place of safety and seated himself inside of the car, the bailment of his person to the defendant would have been accomplished, so that he would not have been prevented from asserting such rights because of his improper way of getting upon the train. But we think that he could not assert them until he had passed the danger which met him on the threshold, and had put himself in the proper place for the carriage of passengers."[5]

But a person in such a position, while unable to take advantage of the general invitation of the carrier, may of course become a passenger by being accepted as such by the proper agent of the carrier. If while standing on the steps he had been accepted as a passenger by the conductor, he would become a passenger; and the same result would follow if a brakeman attempted to help him

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[1] Southern Ry. *v.* Smith, 86 Fed. Rep. 292 (he "did nothing to notify any of the officers or agents of the defendant company that he was even a prospective passenger").

[2] Southern Ry. *v.* Smith, *supra;* June *v.* Boston & A. R. R., 153 Mass. 79, 26 N. E. Rep. 238.

[3] Chicago & E. I. R. R. *v.* Jennings, 190 Ill. 478, 60 N. E. Rep. 818; Webster *v.* Fitchburg R. R., 161 Mass. 298, 37 N. E. Rep. 165.

[4] Merrill *v.* Eastern R. R., 139 Mass. 238, 1 N. E. Rep. 548.

[5] Holmes, J., in Merrill *v.* Eastern R. R , *supra*, at p. 240.

to the platform. In the Massachusetts case it appeared that a brakeman had seen him and told him "to get out of the way so that the [brakeman] could do his work." This fact however was not regarded as making him a passenger; nor in another case was the fact that the person was seen by the conductor on the platform.[1]

In other jurisdictions the courts are inclined to hold that a person becomes a passenger as soon as he reaches the platform in safety. This has been carried so far that if an intending passenger has wrongfully boarded a moving train, but has placed himself in a position of safety, and a servant of the carrier, intending to assist him, injures him, the person is regarded as having become a passenger.[2] And this has been held even where the carrier's servant instead of helping the person pushed him off; the person, having succeeded in getting aboard the train safely as a *bona fide* passenger, being treated as if he had done so before the train started.[3]

If a person is injured while attempting to board a moving train, or to get upon a train in such a way that he does not at that time become a passenger, but he eventually gets on board and is accepted as passenger by the conductor, this acceptance does not relate back to make such person a passenger *ab initio*, and therefore make the carrier responsible as carrier for the injury.[4]

Boarding a Street Car or Omnibus.

It was early held that when a man, intending to take passage in a vehicle which has stopped to receive him, puts his foot upon the step or his hand upon a hand-rail, he has been accepted as a passenger, and the responsibility of the carrier toward him as a passenger begins. The leading case is the English case of Brien *v.* Bennett.[5] An omnibus had stopped for a passenger, and just as the passenger put his foot on the step the omnibus started, throwing the passenger to the ground; the carrier was held liable. The case has been universally followed.[6]

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[1] Illinois C. R. R. *v.* O'Keefe, 168 Ill. 115, 48 N. E. Rep. 294.

[2] Pennsylvania R. R. *v.* Reed, 60 Fed. Rep. 694.

[3] Sharrer *v.* Paxson, 171 Pa. 26, 33 Atl. Rep. 120.

[4] Georgia Pac. Ry. *v.* Robinson, 68 Miss. 643, 10 So. Rep. 60.

[5] 8 C. & P. 724.

[6] Central Ry. *v.* Smith, 74 Md. 216, 21 Atl. Rep. 706; Gordon *v.* West End St. Ry., 175 Mass. 181, 55 N. E. Rep. 990; Davey *v.* Greenfield & T. F. St. Ry., 177 Mass. 106. 58 N. E. Rep. 172; Smith *v.* St. Paul City Ry., 32 Minn. 1, 18 N. W. Rep. 827; Steeg

When the carrier of a street railway or omnibus company sees the signal of an intending passenger, and stops to receive him, it would seem that the person whose signal is thus acted on by the carrier has at that moment become a passenger, even before he reaches the conveyance; for the act of the carrier in stopping the conveyance is an acceptance of the person as a passenger, and that person, having already induced the carrier to act for his benefit, has, it would seem, become responsible for the payment of fare. On each side, therefore, the relation of carrier and passenger has been established. This is in accordance with the reasoning of the court in the leading case of Brien *v.* Bennett,[1] where the carrier's omnibus had stopped at a signal from the plaintiff. Lord Abinger said, "I think that the stopping of the omnibus implies a consent to take the plaintiff as a passenger."

In accordance with this reasoning it has been held in most cases that the relation of carrier and passenger was established the moment the vehicle began to slacken its speed in response to the passenger's signal.[2] Where the invitation is express, there is no doubt of this. So where a train which was going slowly was flagged by an intending passenger, and the conductor told him to jump on, he became a passenger at once.[3]

In Connecticut and Massachusetts, however, it is held that though the car stops in response to a signal, the person for whom it stops does not become a passenger until he reaches the vehicle.[4] In the Massachusetts case the judge at the trial charged that where the car had stopped to receive the intending passenger, "thereby making an offer to be received and an acceptance of that offer,"

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v. St. Paul City Ry., 50 Minn. 149, 52 N. W. Rep. 393; Ganiard *v.* Rochester, C. & B. R. R., 121 N. Y. 661, 24 N. E. Rep. 1092; affirming s. c. 50 Hun (N. Y.) 22, 2 N. Y. Supp. 470. And so of a person who steps upon the gang-plank of a steamboat: Northwestern U. P. Co. *v.* Clough, 22 Wall. (U. S.) 528; or upon the step of a steam railroad car: Texas & P. Ry. *v.* Edmond (Tex. Civ. App.), 29 S. W. Rep. 518.

[1] Brien *v.* Bennett, *supra.*

[2] Finkeldey *v.* Omnibus Cable Co., 114 Cal. 28, 45 Pac. Rep. 996 ("the slackening of the speed in response to his signal was an invitation from the driver for him to board the car"); White *v.* Atlanta St. R. R., 92 Ga. 494, 17 S. E. Rep. 672; Chicago St. Ry. *v.* Williams, 140 Ill. 275, 29 N. E. Rep 672 ("it was a fair question for the jury whether, under all the circumstances, the plaintiff was not invited to get on the car. If he was so invited, he was a passenger"); Butler *v.* Glen Falls, S. H. & F. E. S. R. R., 121 N. Y. 112, 24 N. E. Rep. 187; Lewis *v.* Houston Elec. Co. (Tex. Civ. App.), 88 S. W. Rep. 489.

[3] Kansas & G. S. L. R. R. *v.* Dorough, 72 Tex. 108, 10 S. W. Rep. 711.

[4] Donovan *v.* Hartford St. Ry., 65 Conn. 201, 32 Atl. Rep. 350; Duchemin *v.* Boston E. Ry., 186 Mass. 353, 71 N. E. Rep. 780.

the intending passenger is entitled to the rights and protection of a passenger as he approaches the car to get on it, "at least so far as any defect in that car is concerned." The passenger in that case, while approaching the car, was injured by a sign falling from the car upon him. The Supreme Judicial Court of Massachusetts held the charge erroneous. In the course of his opinion Mr. Justice Barker said:

"A person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth or the street clear of obstructions to his progress than it owes to all other travelers on the highway. It is under no obligation to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such person, who has not yet reached the car, there is any other duty as to the car itself than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car but has not yet reached it. . . . We are unwilling to go farther than the doctrine . . . that when there has been an invitation on the part of the carrier by stopping for the reception of a passenger any person actually taking hold of the car and beginning to enter it is a passenger."

The reasoning of the court has been given at length, because the case is of considerable practical importance in itself, and because the authority of the court, even when opposed to the current of decisions, is great. The arguments used should therefore be analyzed with care.

First, there is said to be no distinction between a passenger who has left a car and one who is about to take it. But the analogy of the carrier of goods makes this statement doubtful. When a carrier of goods accepts goods for immediate carriage, he at once becomes responsible as carrier, though the actual transportation may not begin until later; while at the end of the route he ceases to be liable as carrier and becomes responsible only as warehouseman at once on the ceasing of transportation, according to the view held

in Massachusetts, or at least after the lapse of a "reasonable" time, as certain jurisdictions hold. The same reason which leads to this distinction in the case of the carriage of goods would support it in the case of the carrier of passengers.

Second, it is doubtless true that the carrier would not be responsible for protecting the intending passenger from assault or negligent injury by persons on the street; but this is quite consistent with his having already become a passenger. The duty of the carrier to protect a passenger against third persons is not absolute, but is limited by the power of the carrier to protect by the use of reasonable effort. The carrier, not being in control of the street traffic, cannot reasonably be called upon to furnish protection against it. He would not be liable for an assault or negligent injury by a person on the street to a passenger actually on the car, under the circumstances supposed.

Third, the statement that the carrier is not entitled to compensation at once upon slackening his speed in response to a signal is very questionable. The carrier has been called upon to do something in the line of his business for a particular individual, a thing which only a passenger has a right to demand. It is admitted that the person would be a passenger the moment his foot touched the step, and therefore that the carrier would have a right to demand payment of fare; but the carrier has performed all the service for which this charge is made the moment he stops the car. It may be granted that it would be practically difficult to collect fare if the person in the street changed his mind and turned away before he reached the car; so it would be if he turned away after placing his foot on the step: but that is not saying that the carrier must stop his car gratuitously. If the Massachusetts opinion is correct, there would seem to be no law to prevent a street car being compelled to stop at every street crossing on its route without being entitled to compensation. There is really no proper distinction between the person who has not yet put his foot on the step and the person who has just done so; the consensual relation dates from the moment of mutual consent, that is, the moment of response to the signal.

It is clear, of course, that though the vehicle slackens its speed, if this is not done in response to a signal from the intending passenger, but independently, the intending passenger does not become entitled to the rights of a passenger. His *bona fide* belief that his signal has been seen and responded to is imma-

terial; he must actually secure the consent of the carrier to the relation.[1]

Riding in a Place not Intended for Passengers.

When a person desiring to be transported enters a car or other part of a railroad train not intended for passengers, he does not thereby accept the carrier's invitation; and if there is no express acceptance of him as a passenger he is not entitled to be so treated. In a Texas case[2] it appeared that an intending passenger, having money to pay his fare, came late to the station, and was just able to get on board the front platform of the first car as the train started. This proved to be the front platform of a baggage-car. The fireman, discovering him, compelled him to jump off by turning hot water from a hose on him; and in jumping he was injured. The Court of Civil Appeals held that he could recover as a passenger. "While," they said, "the place one may be occupying upon the train at the time of his injury may be important in determining whether or not he intended to pay his fare, it does not conclusively fix his status, either as a passenger or a trespasser. It may be conceded that a person found in the position occupied by Eaton Williams at the time he was injured is subject to the suspicion of being a trespasser; but if such person, having the means and intending to pay his fare, can, as Eaton Williams in this case did, give a reasonable excuse for why he was not in a passenger coach, he will, in law, be a passenger, and entitled to protection against the wrongful acts of the railroad company and its employés. Neither the carrier nor its employés can assume that a person on any car of a passenger train is a trespasser, and, if they treat him as a trespasser merely because he is not in one of the cars provided for, and usually occupied by, a passenger, and injury results therefrom, and the facts show that he is a passenger, the railroad company will be liable."

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[1] Jones *v.* Boston & M. R. R., 163 Mass. 245, 39 N. E. Rep. 1019; Schepers *v.* Union Depot R. R., 126 Mo. 665, 29 S. W. Rep. 712; Schaefer *v.* St. Louis St. Ry., 128 Mo. 64, 30 S. W. Rep. 331 ("the offer must be made to become a passenger on one part, and an acceptance on part of the company of the passenger on the other, before the relation of carrier and passenger can be said to exist"); Pitcher *v.* People's St. Ry., 154 Pa. 560, 26 Atl. Rep. 559, 174 Pa. 402, 34 Atl. Rep. 567 ("the company was entitled to some kind of notice of his intent to assume the relation of passenger before being charged with the duty of taking care of him as a passenger").

[2] Missouri K. & T. Ry. *v.* Williams (Tex. Civ. App.), 40 S. W. Rep. 350.

This decision was however reversed on appeal to the Supreme Court. One may become a passenger, the court said, by either an express or an implied contract. There was no express contract in this case; and "in order to raise such an implied contract, the party desiring to be carried by the railroad company must take passage on that part of the train provided by it for carrying passengers." [1]

A case almost identical in its facts was decided in South Carolina between the first decision and the appeal in the Texas case; and largely on the authority of the Texas Court of Civil Appeals the plaintiff was held to be a passenger.[2] Chief Justice McIver dissented, taking the same ground on which the Supreme Court placed itself in the Texas case. If, he said, "the plaintiff, with his ticket in his pocket, had got on the pilot, or the engine itself, or upon the tender, or upon the express car, it certainly could not, with any propriety, be said that he had thereby established the relationship of passenger between himself and the company. Why? Simply because such places are not the proper places for passengers to be received or transported; and it seems to me that the same may be said of a baggage car. If, then, the relationship of passenger and carrier had not been established between plaintiff and defendant at the time of the accident, it is clear that the defendant company owed no duty to the plaintiff except such as it might owe him as a trespasser."

The reasoning of the dissenting opinion is hard to resist. The case is not like that of taking a wrong train by mistake; for there the person gets into a car intended for passengers, while here, as the Chief Justice pointed out, he knew that a baggage car was not prepared for the reception of passengers. The haste with which the plaintiff took the train has prevented him from so taking it as to make himself a passenger by bringing himself within the terms of the company's invitation. Yet it must be clear that he can be treated in no worse way than an innocent trespasser; and if wantonly injured by a servant of the company in the course of his employment, the carrier should be liable. It was urged in the dissenting opinion in the South Carolina case that the servant was

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[1] Missouri K. & T. Ry. *v.* Williams, 91 Tex. 255, 42 S. W. Rep. 855. It is hard to see how the defendant could escape liability under the circumstances even by proving that the plaintiff was not a passenger; since the injury was wanton, and was apparently inflicted in the carrier's service.

[2] Martin *v.* Southern Ry., 51 S. C. 150, 28 S. E. Rep. 303.

not acting in the course of the employment; but this view would seem to be mistaken.

The same facts came up in Illinois, and it was held that the person did not become a passenger by getting safely upon the platform.[1] "A passenger must put himself in the care of the railroad company, and there must be something from which it may fairly be implied that the company had accepted him as a passenger."

The distinction is to be noted between persons who having once become passengers then go without permission of the company into some place not provided for passengers, and persons who, intending to become passengers, go in the first instance to such a place. While the latter do not technically become passengers at all, since they never place themselves within the terms of the carrier's offer to receive them,[2] persons who have already become passengers do not forfeit that position by going into some car or some part of a car in which passengers are not allowed to ride. Such conduct may be negligent, and if the negligence contributes to an injury it may therefore bar recovery for the injury; but the recovery cannot be denied on the ground that the injured person was not a passenger.[3]

It often happens, however, that a person is received by the carrier's servant into a vehicle not prepared for passengers, and is permitted to ride there. Such a reception will of course make the person a passenger provided the reception is within the authority of the servant; either because of express permission given by the carrier, or because the reception is within the apparent authority of the servant.

A case of the first kind occurs when a railroad is accustomed to carry passengers in freight cars. Where such a custom exists, one received on a freight train is to be regarded as a passenger quite as much as one who rides on an ordinary passenger train.[4]

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[1] Illinois C. R. R. *v.* O'Keefe, 168 Ill. 115, 48 N. E. Rep. 294. See Farley *v.* Cincinnati, etc., R. R., 108 Fed. Rep. 14.

[2] Bricker *v.* Campbell, 132 Pa. 1, 18 Atl. Rep. 983.

[3] Kentucky C. R. R. *v.* Thomas, 79 Ky. 160 (express car); Bard *v.* Pennsylvania Traction Co, 176 Pa. 97, 34 Atl. Rep. 953 (bumper of street car); Little Rock & F. S. Ry. *v.* Miles, 40 Ark. 298 (top of freight car); Merrill *v.* Eastern R. R., 139 Mass. 238, 1 N. E. Rep. 548 (step of steam-car); New Orleans & N. E. R. R. *v.* Thomas, 60 Fed. Rep. 379 (top of cattle car).

[4] Hazard *v.* Chicago, B. & Q. R. R., 1 Biss. 503; Reber *v.* Bond, 38 Fed. Rep. 822; Ohio & M. R. R. *v.* Mahling, 30 Ill. 9; Ohio & M. Ry. *v.* Dickerson, 59 Ind. 317; Missouri P. Ry. *v.* Holcomb, 44 Kan. 332, 24 Pac. Rep. 467; Whitehead *v.* St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. Rep. 751; Perkins *v.* Chicago, S. L. & N. O. R. R.,

A case of the second kind occurs when passengers are not uncommonly so carried on freight trains in that part of the country, and one is permitted to ride on such a train by the conductor. When for any reason the conductor has apparent authority to receive a passenger, and does so, the relation of carrier and passenger is established.[1]

If a passenger is received by a servant of the carrier in a vehicle in which he knows that he has no right to ride, and that the conductor has no authority to permit him to ride, he does not become a passenger whether he pays fare or not. Thus where the conductor informs him that passengers are forbidden to ride on a freight train, but he persuades the conductor to let him ride nevertheless, he is not a passenger.[2] And on the same principle one is not a passenger who by permission of the carrier's servant or otherwise rides on a locomotive,[3] a hand car,[4] a flat car,[5] or a construction train.[6] In one case it appeared that the passenger was informed by a servant of the carrier that he could not, under the carrier's rules, attach his own freight car to a passenger train and ride in it, as he desired to do; but the servant afterwards permitted it. He was held to be a passenger.[7] If the case can be supported, it must be on the ground that under the circumstances of the case he had reason to sup ose that the permission of the carrier had been obtained.

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60 Miss. 726; Murch *v.* Concord R. R., 29 N. H. 9; Edgerton *v.* New York & H. R. R., 39 N. Y. 227; I. & G. N. Ry. *v.* Irvine, 64 Tex. 529. So in a similar case of one riding on an engine: Lake Shore & M. S. R. R. *v.* Brown, 123 Ill. 162, 14 N. E. Rep. 197; or on a gravel train: Lawrenceburgh & U. M. R. R. *v.* Montgomery, 7 Ind. 474.

[1] Dunn *v.* Grand Trunk Ry., 58 Me. 187; Ohio V. Ry. *v.* Watson, 93 Ky. 654, 21 S. W. Rep. 244; Lucas *v.* Milwaukee & S. P. Ry., 33 Wis. 41; Washburn *v.* Nashville & C. R. R., 3 Head (Tenn.) 638; Everett *v.* Oregon, S. L. & U. N. Ry., 9 Utah 340, 34 Pac. Rep. 289.

[2] Stalcup *v.* Louisville, N. A. & C. Ry., 16 Ind. App. 584, 45 N. E. Rep. 802; Powers *v.* Boston & M. R. R., 153 Mass. 188, 26 N. E. Rep. 446; Eaton *v.* Delaware, L. & W. R. R., 57 N. Y. 382; Louisville & N. R. R. *v.* Hailey, 94 Tenn. 383, 29 S. W. Rep. 367; Houston & T. C. R. R. *v.* Moore, 49 Tex. 31; Gulf, C. & S. F. Ry. *v.* Campbell, 76 Tex. 174, 13 S. W. Rep. 19.

[3] Files *v.* Boston & A. R. R., 149 Mass. 204, 21 N. E. Rep. 311; Stringer *v.* Missouri Pac. Ry., 96 Mo. 299; Rucker *v.* Missouri Pac. R. R., 61 Tex. 499.

[4] Hoar *v.* Maine Central R. R., 70 Me. 65.

[5] Higgins *v.* Cherokee R. R., 73 Ga. 149 (*semble*); Snyder *v.* Natchez R. R. & T. R. R., 42 La. Ann. 302, 7 So. Rep. 582.

[6] McCauley *v.* Tennessee, C. I. & R. R. Co, 93 Ala. 356, 9 So. 611; Graham *v.* Toronto, G. & B. Ry., 23 U. C. C. P. 514.

[7] Lackawanna & B. R. R. *v.* Chenowith, 52 Pa. 382.

Stealing a Ride.

One who steals a ride upon a vehicle of the carrier, that is, conceals himself, intending to evade fare, is not to be regarded as a passenger; [1] and the same thing is true where a person gets on board the carrier's vehicle, refuses either to pay fare or to leave the vehicle, and succeeds in staying on the vehicle by force. In a case of this sort a person entered a stagecoach with a revolver and compelled the driver to allow him to ride without payment of fare. The coach broke down, and he was injured and sued for damages; but it was held that he was not a passenger and could not recover damages.[2]

So where a person is riding on a train, having used or intended to use a ticket which he knows he has no right to use, and concealing or intending to conceal that fact from the conductor, he is not to be regarded as a passenger, even if the conductor permits him to ride.[3] The consent of the conductor to accept the ticket is not material if the consent was obtained by fraud; though probably if knowing the facts the conductor allowed the substitution, the person so allowed to ride would be a passenger; [4] and clearly, if the carrier habitually permitted such substitution, in spite of the exact terms of the ticket, the person using it in accordance with the custom would be a passenger.[5]

A child traveling with an older person who refuses to pay his fare is not entitled to be regarded as a passenger.[6]

This doctrine seems unassailable, though the English Court of Queen's Bench refused to say that the fraud of the older person would prevent the child becoming a passenger.[7] And where the older person *bona fide* fails to pay for the child, though under

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[1] State *v.* Baltimore & O. R. R., 24 Md. 84; Huehlhausen *v.* St. Louis R. R., 91 Mo. 332, 2 S. W. Rep. 315; Chicago B. & Q. R. R. *v.* Mehlsack, 131 Ill. 61, 22 N. E. Rep. 812; Planz *v.* Boston & A. R. R., 157 Mass. 377, 32 N. E. Rep. 356; Barry *v.* Union Ry. (N. Y. App. Div.), 94 N. Y. Supp. 449.

[2] Higley *v.* Gilmer, 3 Mont. 90.

[3] Way *v.* Chicago, R. I. & P. Ry., 64 Ia. 48 (non-transferable mileage-book issued to another); Union Pac. Ry. *v.* Nichols, 8 Kan. 505 (fraudulent impersonation of express messenger); Toledo W. & W. R. R. *v.* Beggs, 85 Ill. 80 (non-transferable free pass issued to another).

[4] Way *v.* Chicago, R. I. & P. Ry., *supra.*

[5] Great Northern Ry. *v.* Harrison, 10 Exch. Rep. 376.

[6] Beckwith *v.* Cheshire R. R., 143 Mass. 68, 8 N. E. Rep. 875.

[7] Blackburn, J., in Austin *v.* Great Western Ry., L. R. 2 Q. B. 442, 446.

the rules of the company a fare is due from a child of that age, the child has been held a passenger.[1]

It sometimes happens that a person enters a carrier's vehicle prepared to pay fare if it is demanded, but hoping to escape the notice of the conductor and so avoid paying fare. It is hard to see how this form of fraud differs from that of a person riding on a non-transferable ticket issued to another; and the better view would seem to be that such a person is not a passenger until by paying his fare he is received as such by express consent of the conductor. Before being so expressly received, he can make himself out a passenger only by bringing himself within the terms of the invitation; and no invitation is extended to persons to enter the vehicle and try to "beat" the company. In a New York case, however, this view was not taken. It appeared in that case that the plaintiff had paid her fare, and taken passage on a ferryboat across a river, but on arriving at the other side, instead of leaving the boat, had crossed back again, without the payment of an additional fare. It was assumed that the fare paid on entering the boat covered only a single passage. It was held that since she did not attempt to conceal herself on the boat she was a passenger on the return trip. The court said:

"She remained on the boat; did not go ashore, so as to pass through the gate at the landing. The employes of the company saw her there, and it was their business to demand her fare, if they intended to charge her. Their doing so would not render her liable to be held guilty of negligence, or of being carried gratuitously, so as not to render the company liable for damages arising through negligence on their part."[2]

However that may be, it is clear that if the traveler in such a case takes any step to conceal himself from the conductor he will not become a passenger. In one case of this sort it appeared that two persons were shipping horses over a railroad, and that by the laws of the road, as they knew, only one person was entitled to be carried free with the horses. A drover's ticket was issued to one of them. The other also entered the stock car with the horses, having no ticket, but afterwards asserted that he was ready to pay his fare upon demand. The conductor would not ordinarily come to a stock car to collect fares from passengers. The court held, and it would seem rightly, that the person riding without a ticket

[1] Austin *v.* Great Western Ry., L. R. 2 Q. B. 442.

[2] Barnard, J., in Doran *v.* East River Ferry Co., 3 Lans. (N. Y.) 105.

was not a passenger.[1] The general question whether a person riding without a ticket but expressing his readiness to pay fare if called upon is a passenger or not is a question of fact.[2]

Guest of a Servant of the Carrier.

One who is riding in the carrier's vehicle, not as ordinary passengers ride, but upon invitation of the carrier's servant, without paying fare, is not a passenger; his relation is with the servant, not with the carrier.[3]

Thus, where a yardmaster out of hours took an engine and car without permission of the defendant company, and invited persons to ride free in the car to a meeting, over a portion of the road not used for passenger trains, he was held not to have even apparent authority to act for the company, and the persons so riding were not passengers.[4] And where a party of children were invited by a servant of the carrier to ride on a train which was being shifted through the yard, they were not passengers.[5]

In a few cases, however, it has been held that children riding on a vehicle by invitation of a servant of the company are entitled to be regarded as passengers. Thus, where the driver of a street car invited children to ride on the front platform, they were held to be passengers;[6] and where a conductor invited a boy to ride in a freight train (on which passengers were sometimes carried) the boy was held to be a passenger.[7] But these cases can hardly be supported on this point. The children concerned were clearly

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[1] Gardner *v.* New Haven & N. Co., 51 Conn. 143.

[2] Ramm *v.* Minneapolis & S. L. R. R., 94 Ia. 296, 62 N. W. 751 (passenger on freight train, intending to pay fare, climbs on flat car because platform of caboose is crowded).

[3] Waterbury *v.* New York, C. & H. R. R. R., 17 Fed. Rep. 671 (riding on engine by consent of engineer); Atchison, T. & S. F. R. R. *v.* Headland, 18 Col. 477, 33 Pac. Rep. 185 (conductor induced to let plaintiff ride free on freight train); Toledo, W. & W. Ry. *v.* Brooks, 81 Ill. 245 (conductor induced to let plaintiff ride free on passenger train); Chicago & A. R. R. *v.* Michie, 83 Ill. 427 (riding on engine by consent of engineer); McVeety *v.* St. Paul, M. & M. Ry., 45 Minn. 268, 47 N. W. Rep. 809 (riding free on freight train); Woolsey *v.* Chicago, B. & Q. R. R., 39 Neb. 798, 58 N. W. Rep. 444 (riding on engine by consent of fireman, to shovel coal); Robertson *v.* New York & E. R. R., 22 Barb. (N. Y.) 91 (riding on engine by consent of engineer).

[4] Chicago, S. P. M. & O. Ry. *v.* Bryant, 65 Fed. Rep. 969.

[5] Reary *v.* Louisville, N. O. & T. Ry., 40 La. Ann. 32, 3 So. Rep. 390.

[6] Wilton *v.* Middlesex R. R., 107 Mass. 108; Muehlhausen *v.* St. Louis R. R., 91 Mo. 332, 2 S. W. Rep. 315; Buck *v.* Power Co., 108 Mo. 185, 18 S. W. Rep. 1090.

[7] St. Joseph & W. R. R. *v* Wheeler, 35 Kan. 185, 10 Pac. Rep. 461; Sherman *v.* Hannibal & S. J. R. R., 72 Mo. 62 (*semble*); Whitehead *v.* St. Louis, I. M. & S. Ry., 99 Mo. 263, 11 S. W. Rep. 751.

guests of the servant, not of the carrier. However far the apparent authority of a conductor may be held to extend, it cannot cover an invitation to ride free; free carriage is not the carrier's business.

If one riding free by invitation of a servant is not a passenger, *a fortiori* one who by misrepresentation induces the servant to let him ride free is not a passenger;[1] and still more clearly one who bribes the servant by a small fee to let him ride without paying the regular fare is not a passenger.[2]

It will be noticed that the cases follow closely the principle laid down at the beginning of this article; and that to prove himself a passenger one must prove either actual acceptance as such by a servant having authority, or else an exact compliance with the terms of an invitation extended by the carrier to the public.

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CAMBBIDGE, MASS.

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[1] Condran *v.* Chicago, M. & S. P. Ry., 67 Fed. Rep. 522.

[2] McNamara *v.* Great Northern Ry., 61 Minn. 296, 63 N. W. Rep. 726; Janny *v.* Great Northern Ry., 63 Minn. 380, 65 N. W. Rep. 450; Brevig *v.* Chicago, S. P. M. & O. Ry., 64 Minn. 168, 66 N. W. Rep. 401.